WHY NUCLEAR DISARMAMENT MAY BE EASIER TO ACHIEVE THAN AN END TO PARTISAN CONFLICT OVER JUDICIAL APPOINTMENTS

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I. INTRODUCTION

Whether the current mode of confirming (or not confirming, as the case may be) nominees to the federal judiciary constitutes a "crisis" is certainly debatable.[1] Fortunately, nothing that we are about to say depends upon whether the criteria for "crisis" have in fact been met. It is enough to acknowledge, as other contributors to this Symposium have demonstrated, that partisan conflict over judicial appointments, especially to what the Constitution calls the "inferior" courts[2]—federal courts of appeals and district courts—has escalated conspicuously in recent years. It is beyond argument that Republicans did what they could to torpedo many of President Clinton's judicial nominations,[3] and that Democrats

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1. There is in fact a lower vacancy rate on the federal bench than was true at any moment during the Clinton presidency. *See* David G. Savage, *Vacancy Rate on Federal Bench Is at a 13-Year Low,* L.A. TIMES, Nov. 6, 2003, at A14, *discussed in* David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma,* 26 CARDOZO L. REV. 479, 527 n.186 (2005).

2. U.S. CONST. art. III, § 1, cl. 2.

3. *See* John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1, 14–22 (2003).

did the same to a number of President Bush's first-term nominees.[4] We see no point in arguing which of the two parties is more to blame for the current level of conflict; suffice it to say that neither party is likely to admit responsibility.

There are many ways to torpedo a judicial nomination. The actual means available to a given party at a particular time depend, however, on the constellation of political power. Once Republicans regained control of the Senate in 1994, the Senate Judiciary Committee could have simply refused to hold hearings and the like; it was totally unnecessary, for example, for the Republican majority to filibuster nominations that never escaped committee in the first place. The same was true when Democrats controlled the Senate briefly from the summer of 2001 through January of 2003, after Senator Jeffords of Vermont abandoned the Republican Party. Democrats experienced no need to defeat nominees on the Senate floor, much less to filibuster them, since they could vote against sending nominations to the full Senate—as in the case of Charles Pickering[5]—or, had they so chosen, they could have simply delayed hearings and votes indefinitely. After the 2002 election returned control of the Senate to the Republican Party, however, the means available to Democrats were considerably reduced. Their efforts as the minority party must now rely upon the actual or threatened use of the filibuster, by which forty-one senators can prevent a floor vote on any given nomination.[6] Notwithstanding the losses they suffered in the 2004 election, the filibuster remains numerically within their reach.[7] Fortunately for the surviving Democrats, a filibuster-proof Senate majority remains a rare occurrence—one that has occurred only three times in the last century.[8]

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4. *See id.* at 22–27; David G. Savage, *Frist Talks Tough on Senate Rules*, L.A. TIMES, Nov. 15, 2004, at A13.

5. For criticism of the Judiciary Committee's vote against the Pickering nomination, see 148 CONG. REC. S1915–18 (daily ed. Mar. 14, 2002) (statement of Sen. Lott).

6. It is beyond the scope of this Article to discuss the arcane practice of "blue slips," by which senators are often able to delay or even preclude full consideration of presidential nominees. For a discussion of this practice, see Part I.D of Professor Law's article cited above in note 1.

7. Charles Babington & Mike Allen, *Two Issues May Deeply Divide Next Congress; Parties Are at Odds over High Court, Social Security*, WASH. POST, Jan. 3, 2005, at A1 ("But Democrats still hold enough seats to mount filibusters, the delaying strategy that requires 60 votes to halt.").

8. *See* NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS 2001-2002, at 56–58 tbls.1–19 (2002); Law, *supra* note 1, at 515 n.163 and accompanying text.

If one believes that such resistance to presidential nominations is a problem—rather than, say, simply American democracy in action—then the obvious question is whether anything can be done about it. For purposes of this brief article, we remain agnostic as to whether it even counts as a "problem" (let alone a "crisis"). A number of distinguished judges, including Virginia's J. Harvie Wilkinson III, testified during the Clinton years that the Fourth Circuit did not in fact need a full complement of judges.[9] If one believes that Judge Wilkinson was testifying in good faith, rather than engaging in strategic misrepresentation to try to head off Democratic dilution of a predominantly conservative Fourth Circuit, then surely Republicans today must point to what has changed to make the presence of any unfilled seats a "crisis."

What most interests us, instead, is whether one can expect any change in the situation in the foreseeable future. To answer this question requires little explicitly "legal" analysis. Rather, one must adopt the perspective of political science and ask how it is that political institutions operate and whether a given status quo—in this instance, heavily partisan infighting over judicial appointments—can easily be changed. There is no good reason to believe that this will occur. And we should state at the outset that our skepticism has nothing to do with any ill-defined decline in "civility" or equally ill-defined rise in "partisanship." It is truly "as pointless as it is popular for commentators to call for civility, cooperation, and ideological restraint."[10] One should not expect politicians to spend their careers fighting for a policy agenda, only to allow the appointment of judges who will spend a lifetime on the bench undermining that agenda, merely because newspaper editors and law professors have admonished them to play nicely. Talk is cheap; talk of "civility" and "restraint" especially so.

Ever since John Adams attempted to pack the federal judiciary with his "midnight judges"[11]—including, most notably and suc-

9. *See* Sarah Wilson, *Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective*, 5 J. APP. PRAC. & PROCESS 29, 37–38 (2003). *But see Considering the Appropriate Allocation of Judgeships in the U.S. Courts of Appeals for the Fourth, Fifth, and Eleventh Circuits: Hearings Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. 29–30 (1997) (statement of Hon. Sam J. Ervin III, U.S. Court of Appeals for the Fourth Circuit) (objecting to Judge Wilkinson's proposal to leave Fourth Circuit vacancies unfilled).

10. Law, *supra* note 1, at 524.

11. *See, e.g.*, Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1783–84 (2003).

cessfully, John Marshall as Chief Justice[12]—appointment to the federal courts has been correctly perceived as an important presidential concern, for the simple reason that presidents have policy goals that are better and more enduringly achieved if the bench is stocked with ideological allies.[13] The fact that the current appointments impasse concerns "inferior" judges rather than Supreme Court nominees is of little surprise, given the obvious contemporary importance of the federal courts of appeals. They are the courts called upon to give concrete meaning to what Anthony Amsterdam years ago accurately suggested were Delphic pronouncements emanating from the oracles in Washington,[14] and their efforts remain undisturbed by the Supreme Court 99.7% of the time.[15]

Though we academics may refuse them the same cachet,[16] decisions issued in New Orleans, Richmond, Pasadena, Denver, and

12. *See, e.g.*, *id.* at 1781.

13. *See* Law, *supra* note 1, at Part I.B (discussing Terry Moe's thesis that presidents seek to have activities critical to successful execution of their policy agenda performed by like-minded appointees).

14. Anthony G. Amsterdam, *The Rights of Suspects*, *in* THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 401–02 (Norman Dorsen ed., 1971). It is worth quoting Amsterdam *in extenso*:

> If we are to believe Pär Lagerkvist's *The Sibyl*, the role of the Pythia, or priestess of the Oracle at Delphi, was of incomparable grandeur and futility. This young maiden was periodically lashed to a tripod above a noisome abyss, wherein her God dwelt and from which nauseating odors rose and assaulted her. There the God entered her body and soul, so that she thrashed madly and uttered inspired, incomprehensible cries. The cries were interpreted by the corps of professional priests of the Oracle, and their interpretations were, of course, for mere mortals the words of the God.
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> The Pythia . . . was viewed with utmost reverence and abhorrence; enormous importance attached to her every utterance; but from the practical point of view, what she said didn't matter much.
>
> . . . .
>
> To some extent, this Pythian metaphor describes the Supreme Court's functioning in all the fields of law with which it deals.

Id. Law professors are unduly impressed—indeed obsessed—by the grandeur and ceremony of the Supreme Court. Most Americans are quite properly uninterested in the often "inspired, incomprehensible cries" delivered by the oracular Court and far more concerned by what meaning the "priests," the ostensibly "inferior" judges, will give to these utterances. *Id.* at 402.

15. Professors Songer, Sheehan, and Haire report that, of the nearly 4,000 decisions rendered by three circuits studied over the course of 1986, only nineteen, or less than half of one percent, were reviewed by the Supreme Court, and of these, only two-thirds were reversed, for a net non-reversal rate of 99.7%. *See* DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 17 (2000).

16. *See, e.g.*, LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 126 (1997) (observing that scholarly emphasis on the Supreme Court has adversely limited attention to

other such cities are far more important, practically speaking, to most Americans than the decisions of the Supreme Court. One need not denigrate the importance of the Supreme Court in order to grasp that any politically savvy president would want to establish control over other federal courts as well. This is especially true if one also recognizes the many opportunities (and reasons) that ostensibly "inferior" federal judges have to resist Supreme Court decisions with which they disagree.[17] The fact that the Supreme Court leaves 99.7% of federal appeals court decisions in place signifies as much the practical inability of the Court to effectively monitor the decisions of these courts as it does the Court's pleasure in their handiwork. There are just too many courts and judges for the nine Justices in Washington, who are now deciding fewer than 100 cases per year, to reverse every errant decision. Every competent lawyer and all political scientists know this. So does any president. To expect a president to be satisfied only with the ability to pack a Supreme Court (assuming Senate cooperation) is equivalent to expecting her to be satisfied with picking only Cabinet officials and ceding control to her potential adversaries over the appointment of non-civil-service deputies and assistant secretaries who require Senate confirmation.

Not surprisingly, then, post-Warren Court presidents, beginning with Jimmy Carter, have done what they can to wrest control over the appointment of circuit judges away from senators of their own party, who in times past enjoyed considerable authority over such appointments.[18] Carter purported, at least, to be motivated by a desire to take the politics out of judicial selection and, to that end, instituted ostensibly non-partisan commissions

other courts); Martin Shapiro, *Political Jurisprudence*, *in* MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, & JUDICIALIZATION 19–54 (2002) (criticizing scholarly preoccupation with the Supreme Court).

17. In fact, there is much reason to think that the Supreme Court has no choice but to modify its own doctrine in response to the threat of resistance—a prominent example being the "all deliberate speed" language of the Court's decision in *Brown v. Board of Education*, 349 U.S. 294, 301 (1955). For a rigorous theoretical version of this argument, see McNollGast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1641–47 (1995) (arguing that the threat of noncompliance by lower courts forces the Supreme Court to modify and loosen legal doctrine).

18. *See* HERMAN SCHWARTZ, PACKING THE COURTS 53 (1988); *see also* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 236–84 (1997).

who would recommend candidates[19] (though his appointees have proven more liberal on the whole than those selected by other Democratic presidents).[20] Ronald Reagan, by contrast, was openly committed to an ideological vision, and his Administration made no bones about the fact that placing ideological helpmates on the federal bench was an important part of governance.[21] As judicial appointments assume increasing importance to the party faithful and to interest groups alike, there is little reason to think that presidents are about to lose their interest in the composition of the federal bench, or that senators of the opposite party will suddenly become content simply to rubber-stamp presidential appointees.

Let us make our point in the most dramatic manner: it is more plausible to imagine the United States successfully engaging in nuclear disarmament with Russia (or even the old Soviet Union) than for presidents and senators of opposing parties to end their political warfare over judicial nominations. Parts II and III of this Article will explain why we believe this to be the case. First, though, we must indulge ourselves in a brief excursus on nuclear disarmament.

II. HOW TO ACHIEVE NUCLEAR ARMS REDUCTION

Imagine two countries, traditional adversaries, each with 1,000 nuclear weapons. Let us also assume that they come to their own independent conclusions that it would be mutually beneficial to engage in some measure of disarmament, given both the maintenance costs and the inevitable risks associated with the command and control of a substantial nuclear arsenal. That is, their desire to reduce the level of armament is a purely self-interested one, rather than an altruistic desire to benefit one's adversaries or even, for that matter, simply to make the world safer. As Mae

19. *See* GOLDMAN, *supra* note 18, at 260.

20. *See, e.g.*, Ronald Stidham et al., *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE 16, 19–20 (1996) (contrasting the voting records of presidential appointees from Nixon through Clinton).

21. *See* Law, *supra* note 1, at Part I.B; *see also* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003) (detailing the highly self-conscious articulation within the Department of Justice of a vision as to how constitutional doctrine should develop, coupled with the desire to place individuals on the bench who would be sympathetic to such developments).

West might put it, "goodness" or altruism, "[has] nothing to do with it."[22]

All problems of arms reduction and, indeed, cooperation in general involve both a bargaining problem and an enforcement problem.[23] The bargaining problem is that of reaching an agreement beneficial to the parties when each party has an incentive to hold out for the best possible deal.[24] The enforcement problem is the one that concerns us here: agreements, once reached, must be implemented and enforced. Assuming that Countries A and B solve the bargaining problem and can actually agree to reduce the level of armament from 1,000 weapons to, say, 250 apiece, it would not be so difficult for them to implement that agreement, given certain assumptions.

It is safe to assume that neither country greatly trusts the other, or else they would not be nuclear rivals. Indeed, blind trust, whether at the international or interpersonal level, is an invitation to exploitation. Thus the immortal words of Ronald Reagan: "Trust, but verify," with all practical emphasis on the latter.[25] Enforcement of any agreement therefore presupposes that each side has sufficiently good intelligence about the other side's number of weapons so that neither seriously fears, for example,

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22. NIGHT AFTER NIGHT (Universal Studios 1932), *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 685 (Justin Kaplan ed., 16th ed. 1992).

23. *See* James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L ORG. 269, 270 (1998).

24. *See id.* at 274 (citing watershed works by John Nash and Thomas Schelling) ("[A] characteristic feature of bargaining problems is that they are dynamic. They are resolved, if at all, through time, in sequences of offers and counteroffers or with one or both parties 'holding out' in hope that the other will make concessions.").

25. The aptness of the phrase can only be appreciated in context. Reagan himself revealed its origins at a press conference:

> Q. Sir, do you trust this opinion of Gorbachev? Do you think he is a man of peace and that he does want to sincerely reduce weapons, and that a verifiable treaty can be reached?
>
> A. As you know, I've had meetings with him, and I do believe that he is faced with an economic problem in his own country that has been aggravated by the military buildup, and I believe that he has some pretty practical reasons for why he would like to see a successful outcome.
>
> Q. Do you trust him?
>
> A. Huh? Do I trust him? Well, he's a personable gentleman, but I cited to him a Russian proverb—I'm not a linguist, but I at least learned that much Russian—and I said to him, "Doveryai, no proveryai." It means, "Trust, but verify."

The President in Venice: Economics, Contra Aid and the Gulf, N.Y. TIMES, June 12, 1987, at A12.

that significant numbers of weapons are being hidden from view.[26] So how might the superpowers reduce their own (and their adversary's) stock of weapons in relatively easy fashion, assuming they have each included that it is in their selfish best interest to do so?

One possible, and not unrealistic, answer is that on day one following the signing of the relevant treaty, Country A (decided, perhaps, by the flip of a coin) destroys one of its missiles in the presence of officials of the other country. On day two, Country B destroys two of its missiles under the same conditions; day three reverts to A, which destroys two of its missiles, and so on for the relevant number of days necessary to reach the targeted number of weapons. Note the crucial fact that relatively little time passes between the actions of each country. This has several desirable consequences. First, it almost certainly assures that the officials who negotiated the treaty are in fact responsible for complying with it. Because their personal reputations are unambiguously at stake, they have every incentive to show that they are in fact "trustworthy" by destroying the two missiles required on any given day. Unexplained failure to comply would surely invite sharp and immediate criticism in both domestic and diplomatic arenas. Moreover, and just as important, any reneging will be obvious and subject to immediate retaliation by the other side, which in this case is the refusal to destroy their own missiles on the day after the reneging. Game theory teaches us, quite bluntly, that "[i]f states could instantaneously detect and respond to defection by another state, there would be no short-term gain from reneging and so no problem of enforcement."[27]

Perhaps this scheme could operate to reduce each side's weapons arsenal to, say, one hundred or even fifty, depending on the minimum number of missiles deemed "enough," by relevant authorities, to constitute a credible deterrent—one assumes that no serious person advocates a nuclear first-strike. However, getting from fifty to zero, or even to five, might pose much greater difficulty. At some point, after all, the marginal value of even one extra missile might be immense. If so, the temptation to renege

26. *See* Fearon, *supra* note 23, at 290–91 ("If an enforcement problem plagued arms control in the early Cold War, this probably had to do with monitoring difficulties rather than a short shadow of the future.").

27. *Id.* at 278.

would increase in a drastic and nonlinear way. Even if genuinely desired by both countries, total disarmament would require extraordinary modes of verification, coupled with a credible threat of sanctions sufficiently likely and severe to deter cheating. In any event, it should be clear why it would be so much more difficult to eliminate the last twenty-five to fifty weapons than the first thousand. Marginal value, rather than absolute numbers, is key: as stockpiles approach zero, the increasing marginal value of a country's remaining missiles and the increasing difficulty of monitoring compliance combine to make total disarmament an elusive goal.[28]

III. WHAT PRESIDENTS *REALLY* WANT IN A JUDICIAL NOMINEE

Let us return now to the question posed by this Symposium—namely, how can partisan warfare over judicial appointments be reduced? What solution we ought to prefer depends upon what kind of judges we believe ought to be appointed. The present impasse over judicial appointments exists for the most part because the President has nominated (and renominated[29]) highly conser-

28. One might, of course, object that backwards induction would lead the two countries not to destroy any of their missiles, even on day one. That is, if Country A knows that it is going "last" (i.e., it is scheduled to have the last missile-destruction turn), it will be greatly tempted to cheat in the last round. And Country B knows that Country A faces this temptation in the last round; therefore, Country B will want to cheat in the next-to-last round, and so on, until the whole agreement unravels in the very first round. It is true that, as a theoretical matter, repeat play may not guarantee cooperation if the players can foresee the end of the game. As a practical matter, however, backwards induction tends not to preordain failure from the very outset. *See* JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 156–58 (1994) (describing how people play the "centipede game" in experimental settings, and noting that uncertainty about the other player's rationality can break backwards induction). For example, noncompliance is inhibited by the value to each country of its reputation and the relationship that is created by cooperation. "In the language of economics, if the relationship itself is a valuable asset that a party could lose by dishonest behavior, then the relationship serves as a *bond*: a [party] would be unwilling to surrender this bond unless the gain from dishonest behavior was large." Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 1 (1990). In the present case, as stockpiles approach zero, the expected gains from noncompliance are likely to outweigh the resulting losses to reputation and relationship, particularly in light of the increasing difficulty of detecting noncompliance. Nevertheless, assuming that the two countries are likely to interact again in the future, the value of their relationship may be enough to deter noncompliance in the early rounds.

29. *See* Michael A. Fletcher & Helen Dewar, *Bush Will Renominate 20 Judges*, WASH. POST, Dec. 24, 2004, at A1 (describing the Administration's plans to resubmit the majority of the judicial nominations previously blocked by Senate Democrats).

vative figures—more conservative on civil rights issues than those appointed by Nixon or Reagan, if a recent study is any indication[30]—and senators have responded by blocking those perceived to be the most extreme.[31] One solution, then, is to embrace the nomination of candidates who hold strong ideological views, which entails a rejection of the filibuster and other tactics by which minorities can hold out for the appointment of moderates. The other solution is to insist upon the nomination of centrists, which entails some limit upon the ability of presidents to nominate whomsoever they choose.[32]

On the one hand, one might not feel that the open clash of opposing ideological viewpoints on the bench is a problem in the first place. One might plausibly think that ideologically committed judges are in fact good for the federal judiciary, precisely because they are more willing to challenge conventional wisdom and call, for example, for the overruling of long-settled precedents that cannot survive critical reassessment. If so, the best solution to the current impasse is to confer unlimited ideological leeway upon the one person authorized to make federal judicial nominations—the president. For such a solution to take hold, however, a deal must be struck: senators of the party that does not control the White House must accede to the most ideological of nominees, while senators on the other side of the aisle must do the same if and when their party loses control of the White House.

30. The study in question, by Professors Carp, Manning, and Stidham, measures the voting record of George W. Bush's first-term district court appointees against that of other judicial cohorts in the areas of civil rights and liberties, criminal justice, and labor and economic regulation. The authors find that the current Administration's appointees have compiled a more conservative voting record in civil rights cases than those of any other administration, Democratic or Republican, in the last forty years. The overall conservatism of the current Bush cohort is offset by a more moderate stance in the areas of criminal justice, labor, and economic regulation, but nevertheless ranks a very close second to that of the Reagan cohort. *See* Robert A. Carp et al., *The Decision-Making Behavior of George W. Bush's Judicial Appointees: Far-Right, Conservative, or Moderate?*, 88 JUDICATURE 20, 26 & tbl.1 (2004).

31. *See, e.g.*, Maltese, *supra* note 3, at 13–14, 24–27; Fletcher & Dewar, *supra* note 29, at A1 (quoting Senate Minority Leader Harry Reid's position that Senate Democrats have rejected "only 10 of the most extreme" judicial nominees).

32. The idea that presidents must occasionally compromise in their choice of judicial nominees is, of course, not a new one. The fault for that idea lies not with today's diminished band of Democratic senators, but with the Framers, for arriving at a constitutional design that places the Senate in the way of the presidential appointment power. *See, e.g.*, MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 28 (2000) (discussing how the Appointments Clause reflected a compromise between those who favored a strong central government, and others who feared the concentration of executive power).

Such a deal, we will argue, is easier said than enforced.

If we think, on the other hand, that open ideological conflict on the bench is a bad thing, then two possible solutions suggest themselves. First, we might simply institutionalize the practical consequences of the filibuster and embrace as completely legitimate the proposition that it not only *does*, but *should*, require the support of at least sixty senators in order for someone to gain a lifetime appointment to the federal judiciary.[33] To be sure, this solution is not perfect, in that it cannot absolutely guarantee the appointment of only centrists. It is conceivable that one party could capture a filibuster-proof majority of sixty Senate seats along with the White House. If so, one could expect a rather skewed slate of judicial appointees. But, in the more likely scenario where the Senate is at least somewhat closely divided between the two parties, one would expect the sixty-vote filibuster hurdle to restrain the selection of extremists. Alternatively, even in the highly unusual event that one party were to win a filibuster-proof majority—an occurrence not witnessed since the aftermath of Watergate[34]—one might well ask whether the political center had not itself shifted.

The second and seemingly obvious solution—namely, that presidents should simply stop nominating ideological extremists—is no solution at all. More precisely, it is nowhere near a cogent response if one recognizes that presidents have political goals and the wit to realize that having friendly men and women on the federal bench is conducive, if not necessary, to realizing those goals. Indeed, one suspects that relatively few of the President's partisan opponents—that is, the senators from the opposing political party—would themselves genuinely wish that a president of their own party would appoint a string of "centrists." One of the rewards, after all, of winning control of both the White House and Senate is that, with luck, one will be able to complete

33. *Compare* John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe,* 82 TEX. L. REV. 1671, 1702 (2004) (describing European supermajority requirements for appointment to national constitutional courts, and suggesting that similar practices might be desirable in the United States), *with* John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 45 HARV. INT'L L.J. ___ (forthcoming 2005) (arguing against the adoption of an express supermajority rule for the confirmation of lower federal court judges, in part because "there is a positive benefit to diversity in jurisprudential approaches that a lower federal judiciary installed by majority rule would likely provide").

34. *See* ORNSTEIN ET AL., *supra* note 8, at 56–58 tbls.1–19.

what Jack Balkin has labeled the "constitutional trifecta" of control over all three branches of the federal government.[35]

This immediately suggests that one might not be able to rely on the same kind of "self-interest" underlying arms control. It is far easier to imagine that leaders of both the United States and Russia might agree that both countries would genuinely benefit from reducing the level of armaments than to believe that leaders of the two political parties will agree that they are both best served by maximizing the number of "centrists" on the bench. More precisely, the appointment of centrist judges may be desirable to the parties, but only as a second-best option when the first-best option of appointing ideological helpmates is unavailable.[36] Perhaps the *country* would best be served by centrists, but that is a far different conclusion from one that the political parties and their most active supporters would benefit. (If one is a fan of James Madison, one might recall his early distrust of political parties as mere "factions," committed to their own rather than the "public" interest.[37])

We assume, then, however sweet and reasonable their rhetoric may be, that presidents prefer to appoint ideologically sympathetic judges over "centrist" judges who are only marginally identified with the positions of one party or the other. And, of course, it is (only) the suspected ideologues who are the recipients of extraordinary Senate attention. There is, for example, no reason whatsoever to believe that contemporary Democrats are resistant to the idea that George W. Bush be able to appoint any judges at all, or that Republicans were eager to deprive Bill Clinton of the ability to appoint even one judge. Other contributions to this Symposium give the specific numbers (and percentages) of nominees who are confirmed,[38] but surely it is clear that the target of Democratic filibusters have either advertised unusually conservative positions or been suspected of deliberately

35. Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1455 (2001); *see* Lucas A. Powe & H.W. Perry, *The Political Battle for the Constitution*, 22 CONST. COMM. ___ (forthcoming 2005).

36. Even the desirability of centrist judges as a second-best option is open to question: for example, Republicans might plausibly prefer a half-empty bench of conservatives to a full bench of centrists.

37. *See* THE FEDERALIST NO. 10, at 60–61 (James Madison) (Jacob E. Cooke ed., 1961).

38. *See* Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 904–08 (2005).

hiding such positions from view.[39] That some nominees have appeared aimed for higher judicial office—by dint of race or gender or both—has hardly whetted Democratic enthusiasm for them. Similarly, Republicans, who confirmed most of Clinton's nominees, reserved their primary fire for those they viewed as strongly liberal or "unsound" on one or another issue that was highly salient, such as the death penalty.[40] So the issue is really whether Democratic and Republican presidents will be given significant freedom to appoint judges strongly identified with particular issues that distinguish the two parties (such as abortion, federalism, the legal rights of the poor, and so on).

If one believes that presidents should have such freedom—perhaps because one thinks, quite plausibly, that it is good for the country to have a politically diverse federal judiciary that includes a suitable number of distinctly non-centrist "mavericks"—then it would obviously be desirable if those exercising the power of confirmation, i.e., members of the United States Senate, could enter into an agreement, in effect, to allow presidents such freedom, secure in the knowledge that, over time, the arrangement will benefit Democrats and Republicans alike, if not also the country at large. But how in the world would one establish (and maintain) such an agreement at the present time?

IV. WHY THE CONFLICT OVER JUDICIAL APPOINTMENTS MAKES NUCLEAR ARMS REDUCTION LOOK EASY

Let us return to our simple (but, we hope, plausible) model of arms reduction. We begin with a model of two leaders (call them presidents, prime ministers, dictators, whatever) who both agree that something needs to be done (i.e., reduce the dangerous level of arms). These leaders exercise effective management over the relevant political institutions needed to ratify and implement any such agreement. This is no minor assumption. The difficulty of obtaining legislative or popular approval introduces several layers of uncertainty that affect both the substance and likelihood of any agreement.[41]

39. *See* Maltese, *supra* note 3, at 22–24.

40. *Id.* at 16.

41. *See* Helen V. Milner & B. Peter Rosendorff, *Democratic Politics and International Trade Negotiations: Elections and Divided Government as Constraints on Trade*

For example, suppose that a dictator—a strong leader who can ratify and implement agreements without the cooperation of other political actors—seeks an agreement with a president who must seek ex post legislative approval. The dictator does not know whether the president will be able to obtain approval for any given agreement; indeed, the dictator does not even know if the president knows. In the course of negotiating an agreement, both sides will be required to make perhaps onerous concessions. The fact that the president must seek approval, however, means not only that the dictator's concessions will be made public, but also that the disclosure will be for naught if the agreement is rejected. The result will be the destruction of the dictator's subsequent bargaining position, if not also personal humiliation. These considerations may reduce the dictator's willingness to make concessions in the first place. Moreover, even if the president does know what the legislature will approve, he will have an incentive to deceive the dictator as to the legislature's willingness to ratify, so long as he is more hawkish than the legislature and stands to gain a negotiating advantage by blaming the legislature for his own recalcitrance. The dictator knows, of course, that the president may be bluffing; what the dictator does not know, however, is whether the president is bluffing. These considerations may induce the dictator to hold out for concessions that the president cannot in fact give. It is precisely for such reasons that it may be easier for dictators or despots to negotiate agreements with one another than with, say, presidents in an American-style separation-of-powers system who must look to an independent legislature for supermajority approval of their agreements with foreign leaders.[42]

For agreement to be reached in the first place, then, it helps if the leaders in question are strong ones empowered to make

Liberalization, 41 J. CONFLICT RESOL. 117, 118, 131 (1997) (observing that the executive's inability to anticipate the legislature's preferences creates uncertainty that makes agreement difficult). The Schelling conjecture, named for Thomas Schelling's 1960 book *The Strategy of Conflict*, suggests that a domestic political requirement of legislative ratification actually strengthens a country's bargaining position: "The need for the hawkish legislature to ratify the agreement means that its hawkishness can be used by the executive to extract an offer it might not have gotten otherwise." *Id.* at 131. Milner and Rosendorff proceed to demonstrate, however, that if the divide between the executive and the legislature is too great, the uncertainty that results frustrates the very possibility of agreement. *See id.* at 118, 131

42. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring a two-thirds vote of the Senate to ratify any treaty).

binding agreements that will in fact be implemented. And for purposes of enforcement, it helps if the agreement will be carried out during the term-of-office of the leaders in question, who will, among other things, have publicly committed all of their prestige to the agreement, including, of course, its most controversial features. Finally, these leaders will need the political (and personal) strength to discipline anyone who proves resistant to implementation of the agreement following formal ratification.

Let us return now to the issue of judicial appointments and the (stipulated) desire to decrease the level of partisan warfare that operates to deny presidents the ability to appoint the kinds of judges most preferred by their respective political parties. We might begin by asking who is empowered to negotiate a deal by which, for example, Republicans would accept the appointment of strong liberals (e.g., Laurence Tribe) and Democrats in turn would acquiesce in the appointment of strong conservatives (e.g., Robert Bork). Is there an analogue to the presidents, prime ministers, and similar officials who ultimately give their imprimatur to grand arms control treaties? It is hard to think of any.

The most likely candidates, of course, are the Senate majority and minority leaders, now Senators Frist from Tennessee and Reid from Nevada. (One might also plausibly suggest the chair and ranking minority member of the Senate Judiciary Committee, though it makes no difference for present purposes.) Let us assume that they actually agree that the current level of partisan bickering in the Senate must be defused, and that the way to do so is for each party to accept any nominee of an opposing-party president—subject, presumably, to minimal and relatively objective criteria of professional competence. That is, as in our arms control example, we assume away the problem of bargaining and skip directly to the problem of enforcement.[43]

43. This is not to imply that the bargaining problem is trivial. On the contrary, it is acute. Why, for example, do presidents and senators of the opposite parties not agree upon a "Missouri compromise" under which conservative and liberal candidates would be paired off and moved simultaneously through the nomination and confirmation processes? Such an arrangement would not be unprecedented: President Clinton adopted Republican Senator Slade Gorton's choice of Richard Tallman for the Ninth Circuit in exchange for the appointment of Willie Fletcher to the same court. (Senate Republicans also insisted, successfully, that Fletcher's mother, Carter appointee Betty Fletcher, take senior status.) *See* Wilson, *supra* note 9, at 44–45 (describing the two-part deal to "throw mama from the bench" and replace "mama" with a Republican). The problem is that, even if adoption of a permanent "Missouri compromise" for judicial appointments is in the

It should go without saying, though we will say it anyway, that neither Frist nor Reid has the slightest authority (or, perhaps more to the point, political weight) to commit their respective party caucuses to such a deal. One might well imagine that Republicans would be delighted to approve it, given the very large expected (and immediate) gains, while Democrats would be altogether torn. But let us imagine that enough Democrats convince themselves to the following effect: "It's worth giving up our bargaining power today because I'm sure we can count on the Republicans to keep their word whenever a Democrat is in the White House."

What would be the immediate consequences of such a deal? Given the current configuration of power (i.e., a Republican President and a Republican Senate), Senate Democrats would have to terminate their filibusters of such nominees as Priscilla Owen and Janice Roberts Brown and, for that matter, confirm Bush's recess appointee to the Eleventh Circuit, former Alabama Attorney General William Pryor.[44] Moreover, as the 2008 presidential election approaches, Republicans would have every incentive to rush through as many appointments as possible in order to leave extremely few (ideally, no) empty seats to be filled by a potentially Democratic successor.

To use the language of our hypothetical arms control process, on day one the Republicans will enjoy seeing their opponents engage in the equivalent of destroying far more than merely one missile. But when, exactly, does day two occur? In the model of arms reduction outlined above, one could seriously envision the day-by-day (or even month-by-month) reciprocity that would provide needed verification of each party's good faith (and, in the process, make the world safer). Is anything similar possible with regard to our distinctly hypothetical Frist-Reid agreement?

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long-term interest of both presidents and senators, each side has an incentive to hold out for a better deal. If each side believes that it can extract a better deal from the other side, and is prepared to wait for that deal, agreement may never occur. It should also be obvious that this type of deal is more viable for "inferior" courts, which usually have enough openings to allow for the simultaneous appointment of multiple judges, than for the Supreme Court, where there is usually only one vacancy at a time (if any).

44. The controversy surrounding another recess appointment, that of District Judge Charles Pickering to the Fifth Circuit, was mooted shortly after the 2004 elections by Judge Pickering's decision to retire from the bench. *See* Adam Liptak, *Judge Appointed by Bush After Impasse in Senate Retires*, N.Y. TIMES, Dec. 10, 2004, at A22.

By definition, day two cannot occur until (and unless) the nation (or, at least, the Electoral College) elects a Democrat who wishes to nominate liberals to counterbalance the presumed conservatives installed by a Republican president, with the acquiescence of the Democrats, on day one. Note, however, that it is not enough to elect a Democratic president to bring about day two. There must also exist some significant number of judicial vacancies (or the political clout necessary to create vacancies by expanding the federal judiciary). If, predictably, Republicans rush the confirmation of judicial nominees and thus minimize the number of vacant seats, it could take some years for a Democratic president genuinely to counterbalance the Republican nominations. The bench-packing we might expect from an outgoing Republican administration would only be exacerbated by the statistically demonstrable tendency of federal judges to time their retirements strategically, so as to facilitate their replacement by presidents of their own party.[45] Even on a purely anecdotal basis, this tendency is already obvious with regard to the Supreme Court, and there is no reason for "inferior" judges to behave much differently. There is, then, likely to be a considerable gap between days one and two in the judicial appointment process. In the meantime, Republicans would enjoy the considerable benefits of Democratic acquiescence.

But let us assume that there is a Democratic president in the White House and, in addition, that there exists a sufficient number of vacancies for control of given circuits to change from Republican to Democratic hands. Would one necessarily trust Senate Republicans to forego the use of their powers if and when a Democrat nominates as judges men and women who are clearly unsympathetic to key aspects of the Republican Party's agenda? Perhaps Senator Frist and other Republican leaders who publicly endorsed the deal would have a reputational interest in demonstrating a willingness to keep their word, even against severe opposition from a political base that is enraged by Democratic appointments. But one can as easily imagine that a Republican leader in Senator Frist's position might renege upon (or "reinter-

45. For statistically significant evidence that federal judges do in fact time their retirements strategically to coincide with control of the White House by their own party, see Deborah J. Barrow & Gary Zuk, *An Institutional Analysis of Turnover in the Lower Federal Courts, 1900–1987*, 52 J. POL. 457, 464, 466–72 (1990).

pret") any such deal because he possesses White House ambitions of his own:[46] A Republican leader who hopes to win the support of highly partisan primary voters in the not-too-distant future might well find it a better investment of his own political capital to renege on the deal than to acquiesce in any "liberalization" of the judiciary. After all, what cost would he pay for reneging? It is pointless to say that angry Democrats would refuse to elect him President; they're not going to do that anyway. Republicans, however, might be delighted to support someone who proved so skilled at snookering the Democrats and getting a bunch of conservative Republicans on the bench. And even if Democrats could figure out a way to make life difficult for him in the Senate, he might well leave that institution, as Bob Dole did, in order to devote all of his time to campaigning for the presidency. To be fancy about it, the likelihood of Frist's departure from the Senate undermines the deterrent effect of retaliation over repeat play.

Reagan's maxim—"Trust, but verify"—is memorable because it expresses a profound truth: "trust" alone, unaccompanied by any plausible incentive structure, is inadequate to generate or sustain significant political change. As devotees of what has come to be called the "new institutionalism" would point out, it is crucial to design institutional structures that generate the proper incentives with regard to achieving the desired public policy. This "new institutionalism" is heavily influenced by so-called "rational choice" theory, itself heavily influenced by economic models of egoistic actors who are motivated—indeed, perhaps exclusively—by a desire to maximize their own self-interests.[47] It is foolhardy to "trust" them to be altruistic; instead, to dress Madison's famous argument in *Federalist No. 51* in modern clothing, one must harness the self-interested ambition of individuals to institutionally created incentives in ways that will serve the public interest.[48]

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46. *See, e.g.*, Charles Babington & Helen Dewar, *Senator Frist's Political Rise Slows in Pace*, WASH. POST, Aug. 8, 2004, at A1 (describing Senator Frist's presidential ambitions).

47. *See, e.g.*, William H. Riker, *Political Science and Rational Choice*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 163, 172–81 (James E. Alt & Kenneth A. Shepsle eds., 1990) (setting forth the premises of the "rational choice" approach).

48. *See* THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

We have already seen that Republicans will be greatly tempted to renege on any agreement, once they have reaped its short-term benefits and the time comes for them to begin paying its costs. One of the few things that might lead them nevertheless to honor the agreement is the very personal interest that senators have in preserving their own reputations, and in avoiding retaliation for promises broken. But how effective is this incentive likely to be, given that no Democratic president will be arriving in Washington until 2009 at the very earliest? The longer the wait for a Democratic president—that is, "day two," in the language of our arms control analogy—the less reason there is to believe that the negotiators (and guarantors) of the agreement, even if we assume they are (or were) completely "trustworthy," will still be around. And it is altogether thinkable that their successors would be more recently elected partisan senators who see strong personal and party advantages in sinking the president's choices. The more that presidents and senators come and go, the harder it becomes for any deal between Republicans and Democrats to endure.

Reneging on commitments is a time-honored tradition in American politics. Consider in this context George W. Bush's repudiation of the Anti-Ballistic Missile Treaty with the former Soviet Union[49] or his withdrawal of the United States signature on the international treaty establishing the International Criminal Court (though, of course, it had not been ratified by the Senate).[50] Indeed, one can go much further back in American history. One of the most notorious cases in American constitutional law is the *Chinese Exclusion Case*,[51] in which Congress simply reneged on the promise the United States had made in a treaty with China with regard to immigration.[52] The Supreme Court unanimously upheld this act of faithlessness on the principle that one Congress cannot bind a successor, and that later legislation, so long as it does not violate some independent constitutional

49. *See* Dana Milbank, *U.S. Withdraws From Missile Treaty: Bush Presses Congress for $7.8 Billion for Defense System*, WASH. POST, June 14, 2002, at A28.

50. *See* Glenn Kessler, *Concerns over War Crimes Court Not New: U.S. Accused of Forgoing Chance to Seek Changes to Ease Clinton-Era Worries*, WASH. POST, July 2, 2002, at A9.

51. 130 U.S. 581 (1889).

52. *See id.* at 589.

ground, can always repeal earlier legislation, including treaties.[53]

Given the seemingly unlimited ability of our government to renege upon its agreements, it is an interesting question why countries enter into treaties with the United States at all, but the subject lies well beyond the scope of this brief article.[54] The present question is why serious politicians—knowing perfectly well their own tendency to renege when it is in their best interest to do so—would ever sacrifice their own real interests at time t by allowing the appointment of ideological adversaries to influential lifetime judgeships, in reliance on a promise that (unnamed and unknown) politicians will do the same at time $t+x$, where x is an unknown and possibly substantial number. That is, compliance with the hypothetical Frist-Reid deal means at least four years of immediate and real Republican gains, in exchange for a promise that a potentially different group of Republicans will return the favor at some undetermined point down the road. Why would any rational Democrat agree to¸ much less comply with, such an arrangement?

V. CONCLUSION

When it comes to the appointment of federal judges, good news and bad news are in the eye of the beholder. If one likes the idea of a more centrist judiciary, then one ought to regard it as good news that it is unlikely that presidents will, in fact, be allowed to place highly ideological figures on the federal judiciary, at least so long as the opposition party in the Senate can rally forty-one votes to sustain a filibuster. To be sure, presidents may continue to nominate ideologues, in part to shore up political support from their bases, even as they expect these nominees to fail. And even extreme nominees may divide the opposition in such a way that makes opposition costly and confirmation there-

53. *See id.* at 600–02.

54. The problem illustrated by the *Chinese Exclusion Case*—namely, the inability of one legislature to bind its successor to a treaty or piece of legislation—is not at all peculiar to the United States. Constitutions often entrench notions of sovereignty that make it difficult for states to keep their commitments, and courts may not necessarily supply the needed enforcement. For example, British courts observe a strong version of parliamentary sovereignty that makes it impossible for Parliament to prevent itself from inadvertently repudiating EU law. *See* David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 665-66 n.37 (2005).

fore plausible. There are strategic advantages for Republican presidents, in particular, to nominate female and ethnic-minority conservatives; recent memory has given us Priscilla Owen, Janice Rogers Brown, Miguel Estrada and, most spectacularly, Clarence Thomas. Similarly, one might expect a Democratic president to seek out political liberals who are also evangelical Christians, though the realities of contemporary American politics suggest that Democratic presidents may have greater difficulty playing the kind of demographic jujitsu at which Republican presidents have demonstrated such skill. Still, the overall thrust would be toward a more moderate, "centrist" judiciary should both parties prove willing to try to block presidential nominees they deem too ideological.

If, on the other hand, one likes the idea of a decent number of ideologues or "mavericks" on the bench, the news seems less optimistic. Perhaps one can hope for "stealth" ideologues, who will turn out to be considerably further along the political spectrum than they appear to be at the time of nomination, but this seems to be a relatively dubious hope. After all, both parties are increasingly devoting considerable resources to investigating any and all nominees for the judiciary precisely in order to guard against such candidates.

Game theorists speak of the "Prisoner's Dilemma," in which two individuals, whose collective interest is mutual silence, will nonetheless have a strong incentive to confess their misconduct to the police because they will individually benefit from doing so. Indeed, a given prisoner will gain maximal advantage if his compatriot in fact does remain silent. Even if one has entered into a solemn pact with the other to remain silent, each has an individual interest in reneging on the deal. The general subject of the Prisoner's Dilemma has generated an extensive literature of its own.[55] Suffice it to say that the only plausible solutions seem to involve either third-party enforcement or a situation of repeat play, in which the threat of future retaliation deters treachery—at least, unless the end of the game comes into sight.[56] Third-party enforcement is not really an option when it comes to dealings between nuclear superpowers or political parties. The salu-

55. *See, e.g.*, ROBERT AXELROD, THE COMPLEXITY OF COOPERATION *passim* (1997); ROBERT AXELROD, THE EVOLUTION OF COOPERATION *passim* (1984).

56. *See supra* note 28 (discussing backwards induction).

tary effects of repeat play are what make plausible the enforcement of the arms control scheme sketched earlier. But, for better and worse, control of the White House does not alternate with sufficient frequency for repeat play to work its wonders on politicians who prefer gains today over uncertain gains at some unknown point in the future. In the meantime, presidents have every incentive to extend their legacy by appointing as many ideological allies to lifetime judgeships as possible. And in response, opposition senators can be expected to use every means at their disposal to prevent presidents from doing so. Conflict over the nomination of ideologues to the federal bench—even to supposedly "inferior" judgeships—is now a feature of the political landscape, and it is not going away. It is for the reader to decide whether this reality is cause for celebration or despair.

For those who do relish a dose of conflict in their politics, the news can only get better. The Republican leadership has threatened, with increasing frequency and vigor, that it will make use of obscure parliamentary tactics to abolish the filibuster, at least with regard to judicial nominations—a course of action known, appropriately enough, as the "nuclear option."[57] The likelihood and consequences of going nuclear must await another day for full exploration. For now, though, two observations are in order.

First, the nuclear option has become more than a remote possibility. To be sure, a handful of moderate Republicans have expressed opposition to the idea, and their views may prove decisive.[58] Nevertheless, the strengthening of the GOP's Senate

57. Helen Dewar & Mike Allen, *GOP May Target Use of Filibuster*, WASH. POST, Dec. 13, 2004, at A1; Alexander Bolton, *Frist Finger on 'Nuclear' Button*, THE HILL (Washington, D.C.), May 13, 2004, at 1, *available at* http://www.hillnews.com/news/051304/frist. aspx (last visited Jan. 22, 2005). Abolition of the filibuster is itself subject to filibuster, but there exist a number of procedural tactics by which the Republican majority could circumvent Democratic resistance. *See id.* The underlying strategy is that a Republican senator would raise a point of order that the consideration of judicial nominees may not be filibustered, and the chair—most likely Vice President Cheney, in his capacity as President of the Senate—would sustain the point of order. *Id.* A simple majority vote would then suffice to win any appeal of the chair's ruling, or to table any objections to the ruling. *See id.* Such filibuster-busting tactics were first perfected over a century ago by the Republican leadership in the House of Representatives. *See* Walter J. Oleszek, *A Pre-Twentieth Century Look at the House Committee on Rules*, Congressional Research Service (Dec. 1998), *available at* http://www.house.gov/rules/pre 20th_rules.htm (last visited Jan. 22, 2005) (discussing the successful efforts of Thomas Reed, first as a member of the Rules Committee then as Speaker, to defeat a variety of Democratic filibusters).

58. *See* Charles Babington, *GOP Moderates Wary of Filibuster*, WASH. POST, Jan. 16, 2005, at A5.

majority, and particularly of its conservative wing, following the 2004 elections renders the threat increasingly plausible. Moreover, the very fact that the Republican leadership has publicly and repeatedly threatened to go nuclear creates pressure to carry out the threat, for the same reasons that make it harder for a nation to avoid war once it has already massed troops on the enemy's border and demanded the equivalent of unconditional surrender. A certain amount of credibility is now at stake, which makes backing down costly (though not as costly, perhaps, as pressing forward).

Second, Senate Democrats possess nuclear options of their own. Even if they lose the battle over judicial appointments, they can wage an expanded war on other fronts. The incoming Senate Minority Leader has already vowed, in his own words, to make the GOP "rue the day" that it tampers with the filibuster, and to "screw things up" throughout the Senate in retaliation.[59] If Senator Reid makes good on his word, Republican senators may find themselves in a Never-Never Land of unending quorum calls,[60] refusal to consent to limits upon debate or amendment, extended debate on whether bills should be debated at all,[61] inexhaustible streams of non-germane amendments,[62] committee paralysis,[63] and whatever other parliamentary mayhem the party of Robert Byrd can muster. In policy terms, Democratic retaliation would likely jeopardize major components of the President's legislative

59. Dewar & Allen, *supra* note 57, at A1 (quoting Senate Minority Leader Harry Reid) ("If they, for whatever reason, decide to do this, . . . they will rue the day they did it, because we will do whatever we can do to strike back[.] I know procedures around here. And I know that there will still be Senate business conducted. But I will, for lack of a better word, screw things up.").

60. *See* SENATE COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, R. VI, cl. 3, at 4 (2d Sess. 2000), *available at* http://rules.senate.gov/senaterules/rule22.htm (last visited Jan. 22, 2005) ("If, at any time during the daily sessions of the Senate, a question shall be raised by any Senator as to the presence of a quorum, the Presiding Officer shall forthwith direct the Secretary to call the roll and shall announce the result[.]").

61. The standing rules of the Senate do not purport to limit the time that may be spent on debate. *See id.* R. XIX, at 13–14. For this reason, the Senate is heavily reliant in practice upon the use of unanimous consent agreements that contain time restrictions.

62. The Standing Rules privilege only appropriations bills from non-germane amendments. *See id.* R. XVI, cl. 4, at 11.

63. *See id.* R. XXVI, cl. 5(a), at 30 (prohibiting committee and subcommittee meetings while the Senate is in session, absent the consent of both the majority and minority leaders).

agenda, including Social Security and tax reform.[64]

Under what conditions, then, might the GOP nevertheless decide to go nuclear? The nuclear option becomes a perfectly rational course of action for Senate Republicans if they believe that the value of untrammeled bench-packing today outweighs both the immediate costs to be inflicted by minority retaliation, and the future loss of their own ability to filibuster odious nominees if and when they find themselves in the minority. It is possible that they do hold these beliefs. Some Republicans may well believe that fear of electoral consequences will deter the remaining Democrats from resisting or retaliating in any meaningful way.[65] And in the immediate aftermath of the 2004 elections, the prospect of Democratic control over both the White House and Senate may strike some Republicans as too remote to give them pause.

Whether these beliefs are justified is a different matter. It is questionable whether Senate Democrats will in fact construe President Bush's wartime re-election or even the defeat of their former leader, Tom Daschle—a Democrat from a Republican state—as any indication of broad popular support for the appointment of conservative federal judges. It is also unclear why Republicans should view the Democratic electoral "base" as any less ideologically driven, especially these days, than is the Republican "base." Democratic and Republican senators alike must

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64. *See* Dewar & Allen, *supra* note 57, at A1 (quoting Democratic Senator Charles Schumer) ("Social Security and tax reform need Democratic support. If [Republicans] use the nuclear option, in all likelihood they would not get Democratic support.").

65. Senator Cornyn's views are illustrative:

> I hope [President Bush's judicial nominees] receive better treatment than they did in the last Congress[.] We experienced unprecedented filibusters of the president's judicial nominees, which I believe the voters repudiated on Nov. 2, both by returning the president with a decisive victory and defeating the chief obstructionist in the Senate, that was the minority leader. . . . Those Democratic senators up for re-election in states Bush did very well in have to be looking at what happened to Tom Daschle in South Dakota and wondering if the same fate is in store for them if they continue to obstruct and prevent up or down votes on the president's nominees.

Deb Riechmann, *Bush to Renominate 20 for Judgeships*, YAHOO! NEWS, Dec. 23, 2004, *at* http://story.news.yahoo.com/news?tmpl=story&cid=536&e=3&u=/ap/20041224/ap_on_go_pr_wh/bush_federal_judges (last visited Jan. 22, 2005) (quoting Republican Senator and Judiciary Committee member John Cornyn); *see also, e.g.*, Fletcher & Dewar, *supra* note 29, at A1 (quoting Senator Cornyn) ("I think the American people sent a strong message on Nov. 2 against the obstructionist tactics that, unfortunately, we saw all too often in the past four years.").

demonstrate the requisite degree of ideological commitment and partisan fervor if they are to stave off vigorous primary challenges from within their own parties.

Meanwhile, at least some GOP senators can be expected to balk at the nuclear option, not simply because they prefer comity to conflict,[66] but also because they grasp that political fortunes are bound eventually to reverse, at which time abolition of the filibuster will become cause for regret.[67] To fear the future in this way, however, requires both a degree of foresight and a sense of longevity—that is, a sense that one will survive long enough to reap the consequences of one's own actions. Neither quality happens to be universal.

66. *See, e.g.*, Babington, *supra* note 58, at A5 (quoting Republican Senator Olympia Snowe) ("I just don't see how it's going to benefit us, even in the majority . . . because ultimately it could create more wedges and political wounds.").

67. *See, e.g.*, Savage, *supra* note 4, at A13 (quoting Republican Senator John McCain) ("I worry about doing away with the rights of the minority in the Senate[.] If I believed the Republicans would be in the majority forever, I'd be far more favorably disposed."); *see also* Babington, *supra* note 58, at A5 (reporting Republican Senator Chuck Hagel's doubts as to the wisdom of the nuclear option, in light of past experience with Democratic control of the Senate).